

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PETER ZEPPEIRO, ) CASE NO. CV 14-01336 MMM (JCx)  
Plaintiff, )  
vs. ) ORDER GRANTING DEFENDANT'S  
GREEN TREE SERVICING, LLC; ) MOTION TO DISMISS  
NORTHWEST TRUSTEE SERVICES, )  
INC. and DOES 1 to 10 inclusive, )  
Defendants. )  
\_\_\_\_\_  
)

On December 3, 2013, Peter Zeppeiro filed this action against Green Tree Servicing, LLC (“Green Tree”), Northwest Trustee Services, Inc. (“Northwest”), and various fictitious defendants in Ventura Superior Court, alleging claims for wrongful foreclosure, violation of the California Homeowner’s Bill of Rights, California Civil Code § 2924.11, and violation of California’s Unfair Competition law (“UCL”), California Business & Professions Code § 17200.<sup>1</sup> On December 17, 2013, Northwest filed a declaration of non-monetary status in state court pursuant to Civil Code § 2924l.<sup>2</sup>

---

<sup>1</sup>Notice of Removal, Docket No. 1 (Feb. 21, 2014), Exh. 1 (Complaint).

<sup>2</sup>Removal, Exh. 4 (Northwest’s Declaration of Non-Monetary Status (“DNMS”)). Section 2924l provides, in pertinent part: “In the event that a trustee under a deed of trust is named in an action or proceeding in which that deed of trust is the subject, and in the event that the trustee maintains a

1 Zeppeiro filed a timely objection to the declaration of non-monetary status on December 30, 2013.<sup>3</sup> On  
 2 January 24, 2014, Green Tree acknowledged receipt of the summons and complaint, which Zeppeiro  
 3 had mailed to it on December 9, 2013.<sup>4</sup> On February 12, 2014, Northwest filed a motion to strike  
 4 Zeppeiro's objection to the declaration of non-monetary status.<sup>5</sup>

5 Before the state court could rule on the motion to strike, Green Tree removed the action to this  
 6 court on February 21, 2014, invoking the court's diversity jurisdiction. The same day, Northwest filed  
 7 a pleading in which it consented to Green Tree's removal.<sup>6</sup> On February 28, 2014, Green Tree filed a  
 8 motion to dismiss,<sup>7</sup> which Zeppeiro opposed.<sup>8</sup> On April 10, 2014, Zeppeiro filed a motion to remand,<sup>9</sup>

---

10 reasonable belief that it has been named in the action or proceeding solely in its capacity as trustee, and  
 11 not arising out of any wrongful acts or omissions on its part in the performance of its duties as trustee,  
 12 then, at any time, the trustee may file a declaration of nonmonetary status. . . . The parties who have  
 13 appeared in the action or proceeding shall have 15 days from the service of the declaration by the trustee  
 14 in which to object to the nonmonetary judgment status of the trustee. Any objection shall set forth the  
 15 factual basis on which the objection is based[.] . . . In the event that no objection is served within the  
 16 15-day objection period, the trustee shall not be required to participate any further in the action or  
 proceeding[.] . . . In the event of a timely objection to the declaration of nonmonetary status, the trustee  
 shall thereafter be required to participate in the action or proceeding." CAL. CIV. CODE § 2924l(a), (c),  
 (d), & (e).

17 <sup>3</sup>Removal, Exh. 6 (Plaintiff's Objection to Defendant Northwest Trustee Services, Inc.'s  
 Declaration of Non-Monetary Status).

18 <sup>4</sup>*Id.*, Exh. 2 (Green Tree's Acknowledgment of Receipt of Service).

19 <sup>5</sup>*Id.*, Exh. 7 (Northwest Trustee Services Inc.'s Motion to Strike Plaintiff's Objection to  
 Declaration of Non-Monetary Status).

20 <sup>6</sup>Defendant Northwest Trustee Services, Inc.'s Consent for Removal, Docket No. 6 (Feb. 21,  
 21 2014). The parties subsequently filed a stipulation concerning Northwest's non-monetary status. (See  
 22 Stipulation re: Non-Monetary Status of Northwest Trustee Services, Inc., Docket No. 30 (Aug. 14,  
 23 2014)). On August 18, 2014, pursuant to this stipulation, the court recognized Northwest's non-  
 24 monetary status under Civil Code § 2924l. (Order re: Non-Participation of Defendant Northwest Trustee  
 Service, Inc., Docket No. 31 (Aug. 18, 2014)). As a result, Northwest is not required to participate in  
 25 the action unless ordered to do so by the court, but is bound by whatever order or judgment is issued.

26 <sup>7</sup>Motion to Dismiss, Docket No. 9 (Feb. 28, 2014).

27 <sup>8</sup>Opposition to Defendant's Motion to Dismiss, Docket No. 13 (Apr. 23, 2014).

28 <sup>9</sup>Motion to Remand Case to Ventura County Superior Court, Docket No. 12 (Apr. 10, 2014).

1 which Greentree opposed.<sup>10</sup> The court denied Zeppeiro's motion to remand, and granted Green Tree's  
 2 motion to dismiss on June 16, 2014.<sup>11</sup>

3 On July 3, 2014, Zeppeiro filed a first amended complaint alleging claims for "wrongful  
 4 foreclosure in violation of § 2924(a)(6)" and violation of California's UCL.<sup>12</sup> Green Tree moved to  
 5 dismiss the amended complaint on July 18, 2014.<sup>13</sup> The court granted the motion in full on October 17,  
 6 2014. It dismissed Zeppeiro's wrongful foreclosure claim with prejudice, but noted that he might be  
 7 able to allege an independent claim for violation of § 2924(a)(6). The court therefore granted him leave  
 8 to amend his complaint to state claims for violation of § 2924(a)(6) and the UCL.<sup>14</sup>

9 On October 30, 2014, Zeppeiro filed a second amended complaint.<sup>15</sup> Defendants filed a motion  
 10  
 11  
 12  
 13

---

14<sup>10</sup>Opposition to Motion to Remand, Docket No. 16 (May 23, 2014).

15<sup>11</sup>Order Denying Plaintiff's Motion to Remand; Granting Defendant's Motion to Dismiss;  
 Ordering Defendant to Show Cause Why Action Should Not Be Remanded For Lack of Subject Matter  
 Jurisdiction, Docket No. 21 (June 16, 2014). Although concluding that Zeppeiro had not identified  
 grounds for remand, the court concluded that Green Tree had not adequately pled its citizenship.  
 Specifically, the court noted that Green Tree had alleged that it was a limited liability corporation whose  
 sole member was a corporation with its principal place of business in Florida. It had not alleged the  
 corporation's state of incorporation. Accordingly, the court *sua sponte* ordered Green Tree to show  
 cause why the action should not be dismissed for lack of subject matter jurisdiction. (*Id.* at 17.) On  
 June 17, 2014, Green Tree proffered evidence that its sole member, Walter Investment Management  
 Corporation, is a Maryland corporation with its principal place of business in Tampa, Florida.  
 (Response to Order to Show Cause, Docket No. 22 (June 17, 2014)). The court found this response  
 adequate and discharged the order to show cause on June 24, 2014. (Order Discharging Order to Show  
 Cause, Docket No. 24 (Jun. 24, 2014)).

23<sup>12</sup>First Amended Complaint ("FAC"), Docket No. 26 (Jul. 3, 2014). Zeppeiro has abandoned his  
 24 HBOR claim under California Civil Code § 2924.11.

25<sup>13</sup>Motion to Dismiss First Amended Complaint, Docket No. 29 (Jul. 18, 2014). See also Reply  
 in Support of Motion to Remand First Amended Complaint, Docket No. 33 (Oct. 2, 2014).

26<sup>14</sup>Order Granting Defendant's Motion to Dismiss First Amended Complaint ("Order"), Docket  
 27 No. 34 (Oct. 17, 2014) at 20.

28<sup>15</sup>Second Amended Complaint ("SAC"), Docket No. 35 (Oct. 30, 2014).

1 to dismiss the complaint on November 11, 2014.<sup>16</sup> Zeppeiro opposes the motion.<sup>17</sup>

## 3 I. FACTUAL BACKGROUND

### 4 A. Facts Alleged in the Complaint

5 Zeppeiro alleges that on October 15, 2002, he obtained a mortgage loan from Homecomings  
 6 Financial Network, Inc. (“Homecomings”) to finance residential property located at 6393 Calle Bodega,  
 7 Camarillo, California, 93012.<sup>18</sup> He asserts that the servicer of the loan changed several times, that it  
 8 eventually became GMAC Mortgage, and that servicing was ultimately transferred to Green Tree on  
 9 February 1, 2013.<sup>19</sup> In March 2013, Zeppeiro requested that Green Tree review his account for a loan  
 10 modification.<sup>20</sup> In response, Green Tree sent Zeppeiro a loan modification application.<sup>21</sup> In or about  
 11 April 2013, Zeppeiro allegedly submitted a full and complete application packet to Green Tree; he  
 12 asserts that this officially commenced loss mitigation options and triggered the newly enacted HBOR.<sup>22</sup>

13 Zeppeiro contends that Green Tree acknowledged the commencement of loss mitigation options  
 14 by performing an initial review of his application.<sup>23</sup> He asserts that his attorneys contacted Green Tree  
 15 on a weekly basis after he submitted the application to ensure that it had all of the information needed.<sup>24</sup>  
 16 He contends that, nonetheless, on or about October 24, 2013, Northwest and Green Tree recorded a  
 17

19<sup>16</sup>Motion to Dismiss Second Amended Complaint (“Motion”), Docket No. 36 (Nov. 11, 2014).

20<sup>17</sup>Opposition to Motion to Dismiss (“Opposition”), Docket No. 50 (Feb. 9, 2015).

21<sup>18</sup>SAC, ¶ 13.

22<sup>19</sup>*Id.*, ¶ 14.

23<sup>20</sup>*Id.*, ¶ 16.

24<sup>21</sup>*Id.*, ¶ 18.

25<sup>22</sup>*Id.*, ¶ 19.

26<sup>23</sup>*Id.*, ¶ 59.

27<sup>24</sup>*Id.*, ¶ 20, Exh. A (Loan Modification Application).

1 notice of default and election to sell the property under the deed of trust.<sup>25</sup> That same day, Green Tree  
2 sent Zeppeiro a notice stating that it had initiated foreclosure proceedings against the property.<sup>26</sup>  
3 Zeppeiro alleges that at no point did Green Tree give a single point of contact for purposes of the loan  
4 modification process.<sup>27</sup>

## **B. Green Tree's Request for Judicial Notice**

6 Green Tree requests that the court take judicial notice of one document related to Zeppeiro's  
7 claims. The document is a notice of rescission of the notice of default and election to sell, recorded  
8 October 31, 2013.<sup>28</sup> The court previously took judicial notice of this document in deciding Green Tree's  
9 motion to dismiss the first amended complaint.<sup>29</sup> Zeppeiro does not oppose Green Tree's request.

In deciding a Rule 12(b)(6) motion, the court generally looks only to the face of the complaint and documents attached thereto. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). A court must normally convert a Rule 12(b)(6) motion into a Rule 56 motion for summary judgment if it “considers evidence outside the pleadings. . . . A court may, however, consider certain materials – documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice – without converting the motion to dismiss into a motion for summary judgment.” *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003). See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (a court may consider “other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court

<sup>25</sup>*Id.*, ¶ 21, Exh. B (Notice of Default and Election to Sell Under Deed of Trust (“Notice of Default”)).

<sup>26</sup>*Id.*, ¶ 22, Exh. C (October 24, 2013 Letter from Green Tree to Zeppeiro).

<sup>27</sup>*Id.*, ¶ 61.

<sup>28</sup>Green Tree's Request for Judicial Notice ("RJN"), Docket No. 40 (Nov. 17, 2014), Exh. 1 (Rescission of Notice of Default and Election to Sell).

## <sup>29</sup>Order at 5-6.

1 may take judicial notice"); *Branch v. Tunnell* 14 F.3d 449, 453 (9th Cir. 1994) (noting that a court  
 2 may consider a document whose contents are alleged in a complaint, so long as no party disputes  
 3 its authenticity), overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119  
 4 (9th Cir. 2002).

5 The document Green Tree seeks to have the court judicially notice was recorded on  
 6 November 1, 2013 by the Ventura County Clerk and Recorder. It is time and date stamped and has  
 7 a record number. Other courts have taken judicial notice of such documents as public filings. See  
 8 *Velazquez v. GMAC Mortgage Corp.*, 605 F.Supp.2d 1049, 1057-58 (C.D. Cal. 2008) (taking  
 9 judicial notice of documents recorded by the Los Angeles County Recorder's Office, including  
 10 deeds of trust); see also *Krug v. Wells Fargo Bank, N.A.*, No. 11-CV-5190 YGR, 2012 WL  
 11 1980860, \*2 (N.D. Cal. June 1, 2012) (public records are judicially noticeable under Rule 201);  
 12 *Grant v. Aurora Loan Services, Inc.*, 736 F.Supp.2d 1257, 1264 (C.D. Cal. 2010) (noting that a  
 13 "[party] provided a reference number for the document, showing that it was in fact recorded; this  
 14 demonstrates that it is a public record"); *Fimbres v. Chapel Mortgage Corp.*, No. 09-CV-0886-IEG  
 15 (POR), 2009 WL 4163332, \*3 (S.D. Cal. Nov. 20, 2009) (taking judicial notice of a deed of trust,  
 16 notice of default, notice of trustee's sale, assignment of deed of trust, and substitution of trustee as  
 17 each was a public record); *Angulo v. Countrywide Home Loans, Inc.*, No. 1:09-CV-877-AWI-SMS,  
 18 2009 WL 3427179, \*3 n. 3 (E.D. Cal. Oct. 26, 2009) ("The Deed of Trust and Notice of Default are  
 19 matters of public record. As such, this court may consider these foreclosure documents"); *Distor*  
 20 *v. U.S. Bank NA*, No. C 09-02086 SI, 2009 WL 3429700, \*2 (N.D. Cal. Oct. 22, 2009) (finding that  
 21 a deed of trust, notice of default and election to sell under deed of trust, and notice of trustee's sale  
 22 were matters of public record and thus proper subjects of judicial notice). Accordingly, as it did  
 23 previously, the court grants Green Tree's request for judicial notice.

24

25

## II. DISCUSSION

26

### A. Legal Standard Governing Motions to Dismiss Under Rule 12(b)(6)

27 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint.  
 28 A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory,"

1 or “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica*  
 2 *Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). The court must accept all factual allegations  
 3 pleaded in the complaint as true, and construe them and draw all reasonable inferences from them  
 4 in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.  
 5 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995).

6 The court need not, however, accept as true unreasonable inferences or conclusory legal  
 7 allegations cast in the form of factual allegations. See *Bell Atlantic Corp. v. Twombly*, 540 U.S. 544,  
 8 553–56 (2007) (“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need  
 9 detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to  
 10 relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a  
 11 cause of action will not do”). Thus, a plaintiff’s complaint must “contain sufficient factual matter,  
 12 accepted as true, to ‘state a claim to relief that is plausible on its face.’ . . . A claim has facial  
 13 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable  
 14 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
 15 678 (2009); see also *Twombly*, 550 U.S. at 555 (“Factual allegations must be enough to raise a right  
 16 to relief above the speculative level, on the assumption that all the allegations in the complaint are  
 17 true (even if doubtful in fact)” (citations omitted)); *Moss v. United States Secret Service*, 572 F.3d  
 18 962, 969 (9th Cir. 2009) (“[F]or a complaint to survive a motion to dismiss, the non-conclusory  
 19 ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a  
 20 claim entitling the plaintiff to relief,” citing *Iqbal* and *Twombly*).

## 21           **B.       Whether Zeppeiro’s § 2924(a)(6) Claim Is Adequately Pled**

22 Green Tree first argues that Zeppeiro’s § 2924(a)(6) claim must be dismissed as premature,  
 23 because there has been no foreclosure sale. Section 2924(a)(6) provides:

24       “No entity shall record or cause a notice of default to be recorded or otherwise initiate  
 25 the foreclosure process unless it is the holder of the beneficial interest under the  
 26 mortgage or deed of trust, the original trustee or the substituted trustee under the deed  
 27 of trust, or the designated agent of the holder of the beneficial interest. No agent of the  
 28 holder of the beneficial interest under the mortgage or deed of trust, original trustee or

substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest.” CAL. CIV. CODE § 2924(a)(6).

4 Green Tree appears to misconstrue Zeppeiro's § 2924(a)(6) claim as one for wrongful foreclosure;  
5 Zeppeiro, however, no longer alleges a wrongful foreclosure claim as he did in the first amended  
6 complaint. Indeed, he was not granted leave to replead such a claim.<sup>30</sup> The crux of Zeppeiro's §  
7 2924(a)(6) claim is that neither Green Tree nor Northwest Trustee was the holder of the beneficial  
8 interest under his mortgage and deed of trust and that despite this fact, they caused a notice of default  
9 to be recorded against the property. Zeppeiro also alleges that Northwest was not acting on behalf of  
10 the original beneficiary, nor was it the substituted foreclosure trustee.<sup>31</sup>

11 Green Tree contends Zeppeiro’s assertion that defendants were not the holders of the beneficial  
12 interest under his mortgage or deed of trust is “inconsistent” with his allegation that he is currently in  
13 loan modification discussions with Green Tree, and with his allegation that Green Tree “was purporting  
14 [ ]to be the entity with [the] beneficial interest.” See, e.g., *Saravia v. Select Portfolio Servicing, Inc.*,  
15 No. 13-cv-01921-RDB, 2014 WL 2865798, \*7 (D. Md. June 23, 2014) (“With contradictory factual  
16 allegations, the Court cannot find a claim with ‘facial plausibility’ under the standards as set forth in  
17 *Iqbal*”). Once again, Green Tree misapprehends the thrust of Zeppeiro’s allegations. Zeppeiro alleges  
18 that Green Tree was his loan servicer, and that it *purported* to hold a beneficial interest in the loan – not  
19 that it actually owned the loan or had a beneficial interest in it. The fact that Green Tree was allegedly  
20 the loan servicer, moreover, does not necessarily mean that it held a beneficial interest in the note and  
21 deed of trust. See *Cervantes v. Countrywide Home Loans*, 656 F.3d 1034, 1038-39 (9th Cir. 2011)  
22 (“After a borrower takes out a home loan, the original lender may sell all or a portion of its beneficial  
23 interest in the loan and change loan servicers. The owner of the beneficial interest is entitled to  
24 repayment of the loan. . . . The servicer of the loan collects payments from the borrower, sends

<sup>30</sup>Order at 20 (dismissing wrongful foreclosure claim with prejudice; granting leave to amend limited to a stand-alone § 2924(a)(6) claim and UCL claim).

<sup>31</sup>SAC, ¶ 49.

<sup>32</sup>payments to the lender, and handles administrative aspects of the loan”).

Zeppeiro’s allegation that Northwest was not acting on behalf of the original beneficiary, and was not the substituted foreclosure trustee is contradicted by the recession of the notice of default it filed, which expressly states that it was the “Agent for the Beneficiary.”<sup>33</sup> The fact that the notice of rescission indicates that Northwest was acting as the beneficiary’s agent, however, does not indisputably make it so. The court nonetheless finds Zeppeiro’s allegations that Green Tree was not the beneficial owner of the mortgage and deed of trust, and that Northwest was not the beneficiary’s agent and/or substituted foreclosure trustee insufficient. The allegations are conclusory and fail to state a plausible claim for relief under *Twombly* and *Iqbal*. Zeppeiro pleads no facts supporting his assertion that neither Green Tree nor Northwest could properly file a notice of default under § 2924(a)(6). See *Iqbal*, 556 U.S. at 678 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”); *Twombly*, 550 U.S. at 555 (“Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)”).<sup>34</sup> For this reason, his allegations are deficient and the § 2924(a)(6) claim must therefore be dismissed.

<sup>35</sup> Zeppeiro's § 2924(a)(6) claim fails for another reason – failure to allege damages adequately.

<sup>32</sup>Northwest Trustee, by contrast, is expressly designated as “Agent for the Beneficiary” on the rescission of notice of default. (See RJN, Exh. 1 (Rescission of Notice of Default and Election to Sell).)

<sup>33</sup>See RJN, Exh. 1 (Rescission of Notice of Default and Election to Sell).

<sup>34</sup>The court notes, moreover, that the damages remedy provided by § 2924.12 is available only after a trustee’s deed on sale has been recorded. Prior to that time, only injunctive relief is available. See CAL. CIV. CODE § 2924.12(b) (“After a trustee’s deed upon sale has been recorded, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall be liable to a borrower for actual economic damages. . .”). Compare CAL. CIV. CODE § 2924.12(a) (providing injunctive relief “[i]f a trustee’s deed upon sale has not been recorded”).

<sup>35</sup>The court notes that many of the allegations in this cause of action do not relate in any way to violation of § 2924(a)(6). Although the claim includes allegations concerning the purported separation of the note and deed of trust, securitization, bad faith in the loan modification process, and failure to supply a single point of contact, the court addresses only those allegations that could potentially support

At least one California district court has questioned whether “there [i]s any relief available for violations of § 2924.” *Penermon v. Wells Fargo Bank, N.A.*, \_\_ F.Supp.2d \_\_, 2014 WL 2754596, \*9 (N.D. Cal. June 11, 2014). In *Penermon*, the court ordered the parties to brief whether § 2924 authorized an award of money damages. After finding plaintiff’s authority inapposite, the court dismissed the claim with leave to identify applicable statutory authority authorizing the recovery of money damages. It noted it did “not believe that it [wa]s authorized to provide money damages for a violation of § 2924 as it was excluded from 2924.12, which explicitly provides for statutory damages for various violations of HBOR and, therefore, the non-judicial foreclosure scheme.” *Id.* at \*10.<sup>36</sup>

The court finds *Penermon* persuasive. Section 2924.12 sets forth the statutory scheme for redressing violations of the HBOR; despite the fact that it references various other HBOR statutes, § 2924.12 does not mention § 2924(a). See, e.g., CAL. CIV. CODE § 2924.12 (“After a trustee’s deed upon sale has been recorded, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall be liable to a borrower for actual economic damages pursuant to Section 3281, resulting from a material violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17”). See also Harry D. Miller and Marvin B. Starr, MILLER AND STARR CALIFORNIA REAL ESTATE 3D, § 10:185 n. 25 (3d ed. 2014) (“The statutory damages remedy is applicable only for violation of Civ. Code, §§ 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, 2924.17, and 2924.18”). Because the California legislature clearly provided money damages as a remedy for certain HBOR violations, but not for others, the court is constrained to conclude that it did not intend to permit the recovery of money damages for a § 2924(a)(6) violation. For that reason, Zeppeiro’s claim for money damages resulting from defendants’ alleged violation of § 2924(a)(6) is not cognizable, and must be dismissed for this reason as well.

Even if money damages are available for violation of § 2924(a)(6), moreover, Zeppeiro has failed adequately to plead an entitlement to such damages. As the court noted in its order granting Green Tree’s motion to dismiss the first amended complaint, Zeppeiro fails to allege any cognizable

---

a claim under § 2924(a)(6).

<sup>36</sup>Civil Code § 2924.12

1 injury caused by defendants' purported statutory violation.<sup>37</sup> The second amended complaint, whose  
 2 allegations are in all relevant respects identical to the first amended complaint, does not plausibly plead  
 3 that there was any cognizable injury caused by the purported violation. The notice of default, recorded  
 4 October 24, 2013, was rescinded seven days later on October 31, 2014.<sup>38</sup> Zeppeiro alleges that as a  
 5 result of defendants' conduct, he suffered general and special damages of not less than \$5,000,000. He  
 6 asserts that these damages include emotional distress and the ruination of his credit and the equity in the  
 7 home. Zeppeiro does not plead any facts to support the conclusory assertion that defendants' purported  
 8 violation of § 2924(a)(6) ruined his credit and equity in the home. Nor does he allege facts showing  
 9 how the ruination manifested itself.<sup>39</sup> Zeppeiro's allegation that he suffered emotional distress damages  
 10 is even more fundamentally flawed, however. Under § 2924.12(b), "a mortgage servicer, mortgagee,  
 11 trustee, beneficiary, or authorized agent shall be liable to a borrower for *actual economic damages* . . .  
 12 . resulting from a material violation of [certain sections *other than* § 2924(a)(6)]." CAL. CIV. CODE §  
 13 2924.12(b) (emphasis added). Thus, even if Zeppeiro could recover damages for defendants' purported  
 14 violation of § 2924(a)(6), he could not recovery emotional distress damages.

15 The remainder of his damages allegations, i.e., anything that might be characterized as "actual  
 16 economic damages," are entirely conclusory and lack any causal link to the purported § 2924(a)(6)  
 17 violation. Cf. *Copeland v. Lehman Bros. Bank, FSB*, No. 09 CV 1774 WQH RBB, 2010 WL  
 18 2817173, at \*4 (S.D. Cal. July 15, 2010) ("Even reading the First Amended Complaint liberally,  
 19 Plaintiff fails to plead non-conclusory factual allegations indicating how he was damaged by the alleged  
 20 failure to fully respond to the QWR," citing *Allen v. United Fin. Mortg. Corp.*, 660 F.Supp.2d 1089,  
 21 1097 (N.D. Cal. 2009) ("Allen only offers the conclusory statement that 'damages consist of the loss  
 22 of plaintiff's home together with his attorney fees.' He has not actually attempted to show that the  
 23 alleged RESPA violations caused any kind of pecuniary loss (indeed, his loss of property appears to  
 24 have been caused by his default").

---

25  
 26 <sup>37</sup>Order at 10-11.  
 27  
 28 <sup>38</sup>RJN, Exh. 1 (Rescission of Notice of Default and Election to Sell).

<sup>39</sup>SAC, ¶ 65.

1       Zeppeiro makes passing reference to the fact he suffered a “ruination of his credit,” but as noted,  
 2 he alleges no facts as to how his credit suffered following the filing of the notice of default, as opposed  
 3 to his failure to make timely mortgage payments.<sup>40</sup> Such facts are particularly necessary as the notice  
 4 of default was rescinded one week after it was filed. Zeppeiro pleads no facts indicating that he suffered  
 5 any form of specific economic harm during the week the notice of default was of record, nor any facts  
 6 indicating that despite the filing of a notice of rescission, he suffered economic harm thereafter as a  
 7 result of the filing of the notice of default. Cf. *Mann v. Bank of Am., N.A.*, No. 13-CV-02293-CAS,  
 8 2014 WL 495617, \*6 (C.D. Cal. Feb. 3, 2014) (“California courts routinely dismiss claims based on  
 9 allegations of ‘robo-signing’ when irregularities in the signing or assignment of the security interests  
 10 do not prejudice the borrower”). Further, because no foreclosure proceedings are pending – and  
 11 certainly none based on the allegedly unlawful, but now rescinded, notice of default – the court cannot  
 12 grant Zeppeiro any injunctive relief. For all of these reasons, his § 2924(a)(6) claim must once again  
 13 be dismissed.

14       **C. Whether Zeppeiro’s UCL Claim Is Adequately Pled**

15       “The UCL prohibits ‘any unlawful, unfair or fraudulent business act or practice and unfair,  
 16 deceptive, untrue or misleading advertising.’” *Stearns v. Select Comfort Retail Corp.*, No. 08-2746  
 17 JF (PVT), 2010 WL 2898284 \*16 (N.D. Cal. July 21, 2010) (quoting CAL. BUS. & PROF. CODE §  
 18 17200). ““An act can be alleged to violate any or all of the three prongs of the UCL – unlawful,  
 19 unfair, or fraudulent.”” *Id.* (quoting *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal.App.4th 1544,  
 20 1554 (2007)). The law is “sweeping, embracing anything that can properly be called a business  
 21 practice and [that is] at the same time . . . forbidden by law.” *Cel-Tech Communications, Inc. v. L.A.*  
 22 *Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999); *Palestini v. Homecomings Fin., LLC*, No.  
 23 10CV1049-MMA, 2010 WL 3339459, \*9 (S.D. Cal. Aug. 23, 2010) (same). California courts have  
 24 held that “an action under the UCL is not an all-purpose substitute for a tort or contract action.”  
 25 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1150 (2003) (citations and internal  
 26 quotation marks omitted).

---

27  
 28       <sup>40</sup>*Id.*, ¶ 64.

1 Green Tree argues that Zeppeiro's UCL claim must be dismissed because he does not allege  
 2 sufficient facts to support his claim that it has violated various laws and thus engaged in unlawful  
 3 practices under the UCL. It also contends that a UCL plaintiff must allege injury in fact, and have  
 4 "lost money or property as a result of [the] unfair competition," *Hall v. Time Inc.*, 158 Cal.App.4th  
 5 847, 849 (2008), and that Zeppeiro has not adequately pled injury in fact.<sup>41</sup> A plaintiff must  
 6 identify the underlying law on which his UCL claim is based to plead a claim based on the unlawful  
 7 prong sufficiently. See, e.g., *Hodges v. Apple Inc.*, Case No. 13-cv-01128-WHO, 2013 WL 4393545,  
 8 \*6 (N.D. Cal. Aug. 12, 2013) (dismissing a UCL claim under the unlawful prong because plaintiff had  
 9 not "ple[ ]d with particularity that Apple violated any law"); *Sleep Science Partners v. Lieberman*, No.  
 10 09-04200 CW, 2010 WL 1881770, \*12 (N.D. Cal. May 10, 2010) ("Plaintiff's UCL claim is dismissed  
 11 with leave to amend. Plaintiff must plead facts that identify the conduct of Sleeping Well that is  
 12 actionable under the UCL, and specify whether it is unlawful – and if so, under what law"); *In re  
 13 Actimmune Marketing Litigation*, No. C 08-02376 MHP, 2009 WL 3740648, \*15 (N.D. Cal. Nov. 6,  
 14 2009) ("[Plaintiffs] must at a minimum [ ] identify the statutory or regulatory provisions that defendants  
 15 allegedly violated").

16 In the second amended complaint, Zeppeiro asserts that defendants violated the UCL because  
 17 they engaged in dual tracking, i.e., they initiated foreclosure proceedings while at the same time  
 18 reviewing his loan modification application; acted in bad faith during the review process by failing  
 19 to identify a qualified single point of contact in violation of California Civil Code § 2923.7; acted  
 20 in bad faith by refusing to conclude the loan modification process and refusing to send written notice  
 21 specifying the reasons for denial of the loan modification application in violation of Civil Code  
 22 § 2429.11; failed to comply with Civil Code § 2924.17, which requires that an accurate and  
 23 complete declaration accompany any notice of default; and failed to contact him in person to assess  
 24 and explore foreclosure alternatives in violation of Civil Code § 2923.5.<sup>42</sup>

25 Although certain of Zeppeiro's factual allegations support his assertion that some of these

---

27 <sup>41</sup>Motion at 7.

28 <sup>42</sup>SAC, ¶ 68.

1 statutes were violated – e.g., that Green Tree engaged in dual tracking, and failed to identify a single  
 2 point of contact – there are no facts, or insufficient facts, to support Zeppeiro’s assertion that Green Tree  
 3 engaged in the balance of the acts that form the basis of the UCL claim. The claim is therefore deficient  
 4 to the extent based on these acts. *Khoury v. Maly’s of California, Inc.*, 14 Cal.App.4th 612, 619 (1993)  
 5 (“A plaintiff alleging unfair business practices under the[ UCL] must state with reasonable particularity  
 6 the facts supporting the statutory elements of the violation”); see also *Saldate v. Wilshire Credit Corp.*,  
 7 686 F.Supp.2d 1051, 1067 (E.D. Cal. 2010) (“The complaint lacks reasonable particularity of facts to  
 8 support a UCL claim. The complaint’s bare reference to federal statutes and common law claims  
 9 provides not the slightest inference that Mr. Saldate has a viable UCL claim”). The court nonetheless  
 10 addresses each purported violation of law in turn to decide whether it supports the UCL claim.

11 Zeppeiro asserts that defendants failed to conclude the loan modification process and refused  
 12 to specify in writing the reasons for denial of his loan modification application in violation of Civil  
 13 Code § 2924.11. It is unclear which of the many subsections of § 2924.11 Zeppeiro contends Green  
 14 Tree violated. His reference to the fact that defendants failed to specify in writing the reasons why he  
 15 did not receive a loan modification suggests he believes the statute concerns the denial of a loan  
 16 modification application.<sup>43</sup> The statute, however, generally concerns a lender’s obligations in the event  
 17 the parties reach a temporary or permanent loan modification agreement. See CAL. CIV. CODE  
 18 § 2924.11. Zeppeiro does not allege his loan modification application was approved in writing, and  
 19 therefore cannot premise his UCL claim on a violation of § 2924.11. See *McFarland v. JP Morgan*  
 20 *Chase Bank*, No. EDCV 13-01838-JGB, 2014 WL 4119399, \*10 (C.D. Cal. Aug. 21, 2014) (“Nowhere  
 21 in the FAC does [p]laintiff allege her loan modification application was approved in writing. In fact, it  
 22 alleges the opposite – that her modification application has never been granted. The Court dismisses  
 23 [plaintiff’s § 2924.11] claim”). More fundamentally, although Zeppeiro asserts that § 2924.11 (or some  
 24 other statute) requires a written statement of the reasons why a loan modification has been denied, the  
 25 first amended complaint nowhere alleges that his loan modification application *has been* denied.

26 Zeppeiro’s allegation that Green Tree committed an unlawful act under the UCL because it  
 27

---

28 <sup>43</sup>*Id.*

1 violated § 2924.17 fares no better.<sup>44</sup> This section states that “[b]efore recording or filing any of the  
 2 [foreclosure-related] documents described in subdivision (a), a mortgage servicer shall ensure that it has  
 3 reviewed competent and reliable evidence to substantiate the borrower’s default and the right to  
 4 foreclose, including the borrower’s loan status and loan information.” See CAL. CIV. CODE §  
 5 2924.17(b). The intent of the statute is to prohibit “the practice of robo-signing, in which servicers sign  
 6 foreclosure documents without determining the right to foreclose.” *Marquez v. Wells Fargo Bank, N.A.*,  
 7 No. CV 13-2819 PJH, 2013 WL 5141689, \*5 (N.D. Cal. Sept. 13, 2013). Zeppeiro contends that Green  
 8 Tree failed “to provide an accurate and truthful declaration attached to the notice of default.”<sup>45</sup> He does  
 9 not allege that the notice of default was robo-signed, and he pleads no facts indicating why the  
 10 declaration was false. As a result, his conclusory assertion that the statute was violated does not suffice  
 11 to state a plausible claim. Given that the allegedly unlawful notice of default was rescinded, moreover,  
 12 Zeppeiro pleads no facts indicating how the purported violation prejudiced or harmed him. *Mann*, 2014  
 13 WL 495617 at \*6 (“California courts routinely dismiss claims based on allegations of ‘robo-signing’  
 14 when irregularities in the signing or assignment of the security interests do not prejudice the borrower.  
 15 . . . Accordingly, the Court finds that plaintiffs cannot premise their claims on allegations of  
 16 robo-signing, as plaintiffs have not shown how that robo-signing was prejudicial to their interests”).  
 17 Consequently, the court cannot conclude that Zeppeiro has alleged a viable claim under the unlawful  
 18 prong of the UCL based on a purported violation of a § 2924.17.

19 Civil Code § 2923.5 requires that before a notice of default is filed, a servicer must contact  
 20 the borrower in person or by telephone to assess the borrower’s financial situation and options to  
 21 prevent foreclosure. CAL. CIV. CODE § 2923.5; *Mabry v. Superior Court*, 185 Cal.App.4th 208, 213-  
 22 14 (2010) (“Civil Code section 2923.5 requires, before a notice of default may be filed, that a lender  
 23 contact the borrower in person or by phone to ‘assess’ the borrower’s financial situation and  
 24 ‘explore’ options to prevent foreclosure”). When a plaintiff pleads a cause of action for violation  
 25 of § 2923.5, the only remedy available is postponement of the foreclosure sale. See *Mabry*, 185

---

26  
 27 <sup>44</sup>*Id.*

28 <sup>45</sup>*Id.*

1 Cal.App.4th at 235 (“We would merely note that under the plain language of section 2923.5, read  
 2 in conjunction with section 2924g, the only remedy provided is a postponement of the sale before  
 3 it happens”). Thus, where a violation of § 2923.5 is the predicate for a claim under the UCL’s  
 4 unlawful prong, the available remedy is an injunction against conducting the foreclosure sale until  
 5 the lender assesses the borrower’s financial status and explores options to avoid foreclosure. See  
 6 *Olds v. Metlife Home Loans*, No. SACV 12–55 JVS (RNBx), 2012 WL 10420298, \*4 (C.D. Cal.  
 7 Mar. 19, 2012); see also *Robinson v. Bank of America*, No. 12–CV–00494–RMW, 2012 WL  
 8 1932842, \*10 (N.D. Cal. May 29, 2012) (“As discussed above, the court finds that plaintiff has  
 9 stated a claim under both [§ 2923.5 and 2924.] The court therefore denies the motion to dismiss the  
 10 UCL claim insofar as it seeks injunctive relief. However, because the only remedy available under  
 11 Sections 2923.5 and 2924 is the postponement of the foreclosure sale, plaintiff’s prayer for  
 12 restitution under the UCL is dismissed”). But see *Rivac v. NDEX West LLC*, No. C 13–1417 PJH,  
 13 2013 WL 3476659, \*9 (N.D. Cal. July 10, 2013) (concluding that “plaintiffs cannot base a UCL  
 14 claim on a violation of the due diligence requirements of Civil Code § 2923.5, as the remedy for  
 15 violation of § 2923.5 is limited to postponement of the foreclosure sale”). This is effectively the  
 16 equivalent of the statutory remedy.

The problem with Zeppeiro’s invocation of § 2923.5 is

17 that the notice of default was rescinded and there is no foreclosure sale pending. Consequently, he  
 18 cannot base a UCL claim in Green Tree’s purported failure to comply with the statute. See, e.g.,  
 19 *Crane v. Fargo*, Case No.: CV 13–01932 KAW, 2014 WL 1285177, \*7 (N.D. Cal. Mar. 24, 2014)  
 20 (“Although Plaintiff identifies §§ 2923.4 and 2923.5 as the underlying statutes [that support his UCL  
 21 claim], this Court finds that since the notice of default has been rescinded and there is no sale  
 22 pending, Plaintiff’s claims that Wells Fargo violated those statutes must be dismissed with  
 23 prejudice”); see also *Croshal v. Aurora Bank, F.S.B.*, Case No.: C 13–05435 SBA, 2014 WL  
 24 2796529, \*7 (N.D. Cal. June 19, 2014) (“It is undisputed that a Notice of Trustee’s Sale has not been  
 25 recorded. Therefore, because there is no trustee’s sale to postpone, Plaintiff’s claim is unripe.  
 26 Accordingly, Plaintiff’s third claim for relief is DISMISSED”); *Tamburri v. Suntrust Mortgage, Inc.*,  
 27 Case No. 11–cv–02899–JST, 2013 WL 4528447, \*4 (N.D. Cal. Aug 26, 2013) (“Here, no sale has  
 28 occurred and none is pending because the second notice of default, which gave rise to this action,

1 has been rescinded. Section 2923.5 does not provide any relief beyond that which Plaintiff has  
 2 already obtained. Consequently, Defendants' motions for summary judgment on Plaintiff's first  
 3 cause of action will be granted and judgment entered in their favor on Plaintiff's section 2923.5  
 4 claim").

5 Zeppeiro's § 2923.6 and § 2923.7 claims require additional scrutiny. Zeppeiro alleges that Green  
 6 Tree violated Civil Code § 2923.6(c), which prohibits "dual tracking."<sup>46</sup> Section 2923.6(c) states that  
 7 "[i]f a borrower submits a complete application for a first lien loan modification offered by, or  
 8 through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or  
 9 authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale,  
 10 while the complete first lien loan modification application is pending." CAL. CIV. CODE § 2923.6(c).

11 Zeppeiro alleges that he submitted a complete loan modification application in approximately April  
 12 2013, and that Green Tree filed a notice of default on October 24, 2013, while the application was still  
 13 pending. These facts suffice to allege a violation of the statute and a potentially unlawful practice under  
 14 the UCL. Zeppeiro, however, fails to allege facts indicating that he suffered any redressable injury as  
 15 a result of the violation, because the notice of default was rescinded seven days after it was recorded.  
 16 If the notice had not been rescinded, the court could presumably have entered an injunction precluding  
 17 defendants from proceeding with a foreclosure sale based on the notice of default. Additionally, as the  
 18 court noted in its order dismissing the first amended complaint, if Zeppeiro paid defendants any sums  
 19 of money to secure recordation of the notice of rescission, the court might be able to order restitution  
 20 of those sums to him.<sup>47</sup> Cf. CAL. CIV. CODE § 2924.12(a)(1) ("If a trustee's deed upon sale has not been  
 21 recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section  
 22 . . . 2923.6"); *Banuelos v. Nationstar Mortgage, LLC*, No. 13-CV-05308 HRL, 2014 WL 1246843, \*3  
 23 (N.D. Cal. Mar. 25, 2014) (stating that a plaintiff can recover "actual economic damages pursuant to  
 24 Section 3281, resulting from a material violation of Section [ ] 2923.6 . . . where the violation was not  
 25 corrected and remedied prior to the recordation of the trustee's deed upon sale"); see also CAL. CIV.

---

26  
 27 <sup>46</sup>*Id.*

28 <sup>47</sup>Order at 17.

1 CODE § 2924.12(c) (“A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not  
 2 be liable for any violation that it has corrected and remedied prior to the recordation of a trustee’s deed  
 3 upon sale, or that has been corrected and remedied by third parties working on its behalf prior to the  
 4 recordation of a trustee’s deed upon sale”). Here, the notice of default was rescinded before a  
 5 foreclosure sale took place. Zeppeiro alleges no facts indicating that he provided any consideration to  
 6 defendants to secure rescission of the notice of default. Consequently, Zeppeiro has not stated a viable  
 7 claim under the unlawful prong of the UCL for violation of § 2923.6.

8 Civil Code § 2923.7(c) requires that a mortgage servicer must, upon the borrower’s request,  
 9 identify an employee who will serve as the borrower’s single point of contact and remain assigned to  
 10 the borrower’s account until the mortgage servicer determines that all loss mitigation options have been  
 11 exhausted or the borrower’s account has been brought current.<sup>48</sup> Zeppeiro’s complaint alleges that  
 12 defendants “fail[ed] to establish a single point of contact upon [his] request.”<sup>49</sup> Although Zeppeiro could  
 13 have pled additional facts, this suffices to allege that he made a specific request for a single point of  
 14 contact and defendants failed to provide one. Accordingly, Zeppeiro has adequately alleged a violation  
 15 of § 2923.7. Compare *Williams v. Wells Fargo Bank, NA*, No. CV 13–02075 JVS (DTBx), 2014 WL  
 16 1568857, \*8 (C.D. Cal. Jan. 27, 2014) (“[T]he text of section 2923.7 requires that the borrower make  
 17 a specific request for a single point of contact. The Complaint does not allege that Plaintiffs made any  
 18 such request”); *Saber v. JPMorgan Chase Bank, N.A.*, No. CV 13-00812-DOC, 2014 WL 255700,  
 19 \*3 (C.D. Cal. Jan. 23, 2014) (“Plaintiff’s SAC states only that Defendant failed to provide him with  
 20 a single point of contact, and lists a series of statutory responsibilities. Plaintiff again does not allege  
 21 any additional facts to support the conclusion Defendant violated § 2923.7. Listing the obligations  
 22 for which the single point of contact is responsible does not allege any new facts to support the

---

23

24 <sup>48</sup>Civil Code § 2923.7 provides: “Upon request from a borrower who requests a foreclosure  
 25 prevention alternative, the mortgage servicer shall promptly establish a single point of contact and  
 26 provide to the borrower one or more direct means of communication with the single point of contact.  
 27 . . . The single point of contact shall remain assigned to the borrower’s account until the mortgage  
 28 servicer determines that all loss mitigation options offered by, or through, the mortgage servicer have  
 been exhausted or the borrower’s account becomes current.” CAL. CIV. CODE § 2923.7(a), (c).

49SAC, ¶ 68.

1 conclusion espoused by Plaintiff. . . . Therefore, Plaintiff's section 2923.7 claim is DISMISSED").

2  
 3 Because Zeppeiro fails adequately to allege a violation of Civil Code §§ 2924.11, 2924.17 and  
 4 2923.5, his UCL claim fails to the extent based on these statutes. To the extent Zeppeiro's UCL claim  
 5 is based on his § 2924(a)(6) claim, it must be dismissed because the underlying claim is deficient. See,  
 6 e.g., *Krantz v. BT Visual Images, L.L.C.*, 89 Cal.App.4th 164, 178 (2001) (noting that a UCL claim is  
 7 "incidental to and depend[s] upon the validity (or invalidity) of the preceding claims for relief," and  
 8 therefore "stand[s] or fall[s] depending on the fate of the antecedent substantive causes of action"); see  
 9 also *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001) (affirming the dismissal of a  
 10 UCL claim where underlying negligence and fraud claims were deficient); *Khan v. CitiMortgage, Inc.*,  
 11 975 F.Supp.2d 1127, 1146 (E.D. Cal. 2013) ("The FAC lacks facts of an unlawful, unfair or fraudulent  
 12 business practices to support a UCL claim, despite Ms. Khan's unsubstantiated claims. . . . As  
 13 demonstrated throughout this order, the complaint's claims fail and thus cannot serve as a predicate  
 14 violation for a UCL claim"); *Bejou v. Bank of Am., N.A.*, No. CV 13-0125 LJO SMS, 2013 WL  
 15 1759126, \*5 (E.D. Cal. Apr. 24, 2013) ("Reliance on other invalid claims fails to support a viable UCL  
 16 claim"); *Newsom v. Countrywide Home Loans, Inc.*, 714 F.Supp.2d 1000, 1010 (N.D. Cal. 2010)  
 17 ("Where a plaintiff cannot state a claim under the 'borrowed' law, he or she cannot state a UCL claim  
 18 either"); *Hutson v. American Home Mortgage Servicing, Inc.*, No. CV 09-1951 PJH, 2009 WL  
 19 3353312, \*15 (N.D. Cal. Oct. 16, 2009) ("To the extent plaintiffs' section 17200 claim is predicated  
 20 on American Home's violations of TILA and its regulations, it fails as a matter of law. Plaintiffs'  
 21 TILA rescission and damages claims are time-barred as noted above, and thus their UCL claim  
 22 based on TILA violations likewise fails"); *Singh v. Wells Fargo Bank, N.A.*, No. CV 09-2035 SC,  
 23 2009 WL 2365881, \*5 (N.D. Cal. July 30, 2009) (dismissing a UCL claim because it was based on  
 24 fraud and discrimination claims the court had already found deficient).

25 Green Tree also argues that the claim must be dismissed in all respects – including to the extent  
 26 based on dual tracking and failure to provide a single point of contact – because Zeppeiro has not  
 27 adequately alleged that he suffered injury in fact as a result of its conduct, and therefore lacks standing

1 to bring the claim.<sup>50</sup> “[A] plaintiff must have suffered an injury in fact and have lost money or property  
2 as a result of [the] unfair competition to have standing to pursue either an individual or a representative  
3 claim under the California unfair competition law.” *Hall*, 158 Cal.App.4th at 849 (citing CAL. BUS. &  
4 PROF. CODE § 17204); see also *Plastino v. Wells Fargo Bank*, No. C 12-01037 CRB, 2012 WL  
5 2061515, \*6 (N.D. Cal. June 7, 2012); *Jensen v. Quality Loan Service Corp.*, 702 F.Supp.2d 1183, 1199  
6 (E.D. Cal. 2010); *Paulus v. Bob Lynch Ford, Inc.*, 139 Cal.App.4th 659, 677 n. 13 (2006) (“Proposition  
7 64’s<sup>51</sup> provisions . . . chang[ed] the language of the [UCL] to read that a person could bring suit only  
8 if the person ‘has suffered injury in fact and has lost money or property as a result of such unfair  
9 competition.’ . . .”); *Harris*, 138 Cal.App.4th at 33 (California Business and Professions Code § 17203  
10 “now requires that relief may be sought only by persons who have themselves suffered injury”).

In his complaint, Zeppeiro alleges that he has suffered injury in fact “in that [he] has been unable

## <sup>50</sup>Motion at 6-7.

<sup>51</sup>On November 2, 2004, California voters passed Proposition 64; it took effect the following day, in accordance with Article II, Section 10 of the California Constitution. *Lyons v. Chinese Hosp. Ass'n*, 136 Cal.App.4th 1331, 1336 n. 2 (2006); see also *R&B Auto Ctr., Inc. v. Farmers Group, Inc.*, 140 Cal.App.4th 327, 359 (2006). Proposition 64 amended the Business and Professions Code to require that persons suing as “private attorneys general” or on behalf of others show that they have suffered injury as a result of an allegedly unfair business practice. See CAL. BUS. & PROF. CODE § 17535 (“Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section. . ..”); *id.*, § 17204 (“Actions for any relief pursuant to this chapter shall be prosecuted exclusively . . . by the Attorney General or any district attorney . . . or upon the complaint of any board, officer, person, corporation or association or by *any person who has suffered injury in fact and has lost money or property as a result of such unfair competition*” (emphasis added)); see also *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 323 (2011) (“Proposition 64 requires that a plaintiff have ‘lost money or property’ to have standing to sue. The plain import of this is that a plaintiff now must demonstrate some form of economic injury”); *Paulus*, 139 Cal.App.4th at 677 n. 13 (“Proposition 64’s provisions . . . chang[ed] the language of the [UCL] to read that a person could bring suit only if the person ‘has suffered injury in fact and has lost money or property as a result of such unfair competition.’ . . .”); *Harris v. Investor’s Business Daily, Inc.*, 138 Cal.App.4th 28, 33 (2006) (California Business and Professions Code § 17203 “now requires that relief may be sought only by persons who have themselves suffered injury”); *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal.App.4th 997, 1010 (2005) (Proposition 64 amendments “limit private representative actions to persons who . . . meet the standing requirements set forth in section 17204, which include injury in fact”).

1 to [obtain] a good faith review for any loss mitigation options, including a loan modification.”<sup>52</sup> He also  
 2 contends that he has suffered “diminution” in his credit rating.<sup>53</sup> “A plaintiff suffers an injury in fact  
 3 for purposes of standing under the UCL when he or she has: (1) expended money due to the defendant’s  
 4 acts of unfair competition; (2) lost money or property; or (3) been denied money to which he or she has  
 5 a cognizable claim.” *Marilao v. McDonald’s Corp.*, 632 F.Supp.2d 1008, 1012 (S.D. Cal. 2009) (citing  
 6 *Hall*, 158 Cal.App.4th at 854–55). “This statutory limitation requires that a plaintiff show he has  
 7 suffered losses capable of restitution,” as restitution and an injunction are the only remedies available  
 8 for violation of the UCL. *Small v. Mortgage Electronic Registration Systems, Inc.*, Nos. 09-cv-0458,  
 9 2:10-cv-0342, 2010 WL 3719314, \*12 (E.D. Cal. Sept.16, 2010) (internal citations omitted).  
 10 “Ordinarily when we say someone has ‘lost’ money we mean that he has parted, deliberately or  
 11 otherwise, with some identifiable sum formerly belonging to him or subject to his control; it has passed  
 12 out of his hands by some means, such as being spent or mislaid.” *Silvaco Data Systems v. Intel Corp.*,  
 13 184 Cal.App.4th 210, 244 (2010).

14 Neither form of injury Zeppeiro alleges is of this type. At the hearing, his lawyer disputed this  
 15 conclusion. He argued that Green Tree’s failure to approve Zeppeiro for a loan modification when he  
 16 first sought one had led to higher arrearages, late fees, foreclosure fees, and interest charges. The  
 17 complaint contains no allegations, however, that Zeppeiro has made any payments on his mortgage since  
 18 defaulting. As noted, UCL damages claims are limited to restitution; “[t]o show [entitlement] to  
 19 restitution, a plaintiff must demonstrate that the defendant is in possession of money or property taken  
 20 from [him or] her.” See *Asghari v. Volkswagen Grp. of Am., Inc.*, 42 F.Supp.3d 1306, 1324 (C.D. Cal.  
 21 2013); *Groupion, LLC v. Groupon, Inc.*, 859 F.Supp.2d 1067, 1083 (N.D. Cal. 2012) (holding that  
 22 restitution was unavailable because plaintiff “ha[d] not submitted any evidence or . . . argument, to show  
 23 that [defendant] obtained money from [plaintiff] or that [plaintiff] otherwise ha[d] any ownership  
 24 interest of any of [defendant’s] profits,” citing *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th  
 25 663, 699 (2006) (a plaintiff can seek money or property as restitution only when the “money or property

---

27                           <sup>52</sup>SAC, ¶ 76.

28                           <sup>53</sup>*Id.*

1 identified as belonging in good conscience to the plaintiff [can] clearly be traced to particular funds or  
 2 property in the defendant's possession"); *Hill v. Opus Corp.*, 464 B.R. 361, 394 (C.D. Cal. 2011)  
 3 (restitution is not available where the money claimed by plaintiff cannot be "traced to any particular  
 4 funds in [defendants'] possession"); *EchoStar Satellite Corp. v. NDS Group PLC*, No. SA CV03-0950  
 5 DOC, 2008 WL 4596644, \*9 (C.D. Cal. Oct. 15, 2008) ("Restitution under the UCL is only available  
 6 where the sum at issue can clearly be traced to particular funds or property in the defendant's  
 7 possession. . . . As the Court previously recognized, NDS never directly took anything from EchoStar.  
 8 . . . Simply put, it is plain that EchoStar is seeking to dress up its unsuccessful damages claim as one  
 9 for restitution under the UCL. However, such relief is not available" (internal quotation marks and  
 10 citations omitted)); see also *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1268 (1992) (when  
 11 restitution is ordered, "defendant is asked to return something he wrongfully received; he is not asked  
 12 to compensate the plaintiff for injury suffered as a result of his conduct"). The fact that Zeppeiro does  
 13 not allege that he paid defendants any of the additional arrearages, late fees, foreclosure fees, or interest  
 14 charges his lawyer mentioned at the hearing makes his UCL claim deficient and subject to dismissal.

15 More fundamentally, it is well settled that § 2923.5 and § 2923.7 do "not create a right to a loan  
 16 modification." *Rockridge Trust v. Wells Fargo, N.A.*, 985 F.Supp.2d 1110, 1153 (N.D. Cal. 2013)  
 17 (quoting *Roberts v. JP Morgan Chase Bank, N.A.*, No. 09-CV-01855-LHK, 2011 WL 864949, \*4 (N.D.  
 18 Cal. Mar. 11, 2011), in turn citing *Mabry v. Superior Court*, 185 Cal.App.4th 208, 231 (2010) ("[T]here  
 19 is no right, for example, under the statute, to a loan modification")); see also *Katsch v. JP Morgan*  
 20 *Chase*, No. 5:14-CV-04730-BLF, 2015 WL 534584, \*4 (N.D. Cal. Feb. 9, 2015) ("The fact that Chase  
 21 did not grant him a loan modification is insufficient, as a lender has no obligation to grant modification  
 22 even if the applicant is qualified"); *Kaufman v. JPMorgan Chase Bank, N.A.*, No. 2:14-CV-02217-ODW,  
 23 2014 WL 2094284, \*3 (C.D. Cal. May 20, 2014) ("Kaufman has no right to a  
 24 loan modification under state or federal law"); *Pazargad v. Wells Fargo Bank, N.A.*, No. CV 11-4524  
 25 ODW PJWX, 2011 WL 3737234, \*4 (C.D. Cal. Aug. 23, 2011) ("[T]here is no right under California  
 26 law to a loan modification"). Thus, because he was not entitled to a loan modification, Zeppeiro's  
 27 attempt to hinge his damages on Green Tree's purported failure to grant a loan modification is  
 28 unavailing.

1       Similarly, as noted, because the notice of default was rescinded, there has been no foreclosure  
 2 sale, and Zeppeiro does not allege that he paid defendants any form of consideration to secure rescission  
 3 of the notice of default. Accordingly, he has suffered no injury in fact to the extent the UCL claim is  
 4 premised on a violation of Civil Code § 2923.6(c). Zeppeiro has thus failed adequately to allege that  
 5 he has standing to assert a UCL claim. This provides another basis upon which the UCL claim must be  
 6 dismissed.

7           **D.      Whether the Court Should Grant Leave to Amend**

8       Green Tree argues that Zeppeiro's complaint should be dismissed with prejudice. Zeppeiro has  
 9 now had three opportunities to plead viable claims, and the court has passed on the adequacy of the  
 10 claims in each complaint in deciding motions to dismiss filed by Green Tree. Despite the fact that the  
 11 court has issued detailed rulings suggesting how Zeppeiro might be able to allege facts sufficient to state  
 12 viable claims for relief, or show he has suffered a cognizable injury, Zeppeiro has filed substantially  
 13 identical complaints that fail to cure the deficiencies noted by the court. In its prior order dismissing  
 14 the first amended complaint, the court cautioned Zeppeiro that if he failed to cure the defects noted in  
 15 the order in any second amended complaint, it would likely find any further attempt to amend futile and  
 16 dismiss the claims with prejudice.<sup>54</sup> See *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir.  
 17 2008) (“Dismissal without leave to amend is proper if it is clear that the complaint could not be saved  
 18 by amendment”); *California ex rel. California Department of Toxic Substances Control v. Neville  
 19 Chemical Co.*, 358 F.3d 661, 673 (9th Cir. 2004) (“[D]enial of leave to amend is appropriate if the  
 20 amendment would be futile,” citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). In his opposition,  
 21 Zeppeiro makes no argument that suggests he can amend his complaint to allege a viable § 2924(a)(6)  
 22 or UCL claim. See *Broam v. Bogan*, 320 F.3d 1023, 1032 n. 2 (9th Cir. 2003) (“Facts raised for the first  
 23 time in plaintiff's opposition papers should be considered by the court in determining whether to grant  
 24 leave to amend or to dismiss the complaint with or without prejudice.”). Because Zeppeiro has realleged  
 25 the same deficient allegations each time the court has granted him leave to amend, and because he does  
 26 not indicate he can cure the deficiencies, the court finds that granting leave to amend would be futile,

---

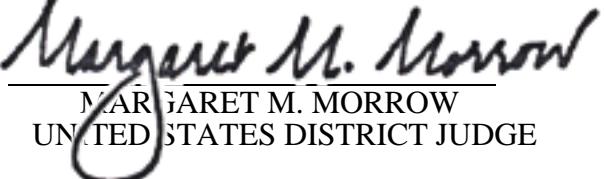
27  
 28           <sup>54</sup>Order at 20.

1 and thus dismisses the action with prejudice.  
2  
3

### III. CONCLUSION

4 For the reasons stated, the court grants Green Tree's motion to dismiss in full. Dismissal is with  
5 prejudice.  
6  
7

DATED: April 15, 2015  
8  
9

  
MARGARET M. MORROW  
UNITED STATES DISTRICT JUDGE

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28